

13 April 2020

COVID-19 response – amendments to the Western Australian planning legislation

An amendment to Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (**Deemed Provisions**) was published in the *Government Gazette* on Friday 3 April 2020.

The Amendment is the insertion of a new Part 10B to the Deemed Provisions, entitled ‘Exemptions from planning requirements for state of emergency’.

The provisions allow the Minister, by notice, to exempt specific ‘planning requirements’, for the purposes of ‘facilitating response to, or recovery from’ an emergency declared under the *Emergency Management Act 2005*.

Those specific planning requirements are outlined in clause 78H(3), and include –

- A requirement to obtain development approval
- A requirement to satisfy a condition of a development approval
- A requirement relating to land use permissibility
- A requirement to consult or advertise, and in relation to time limits and forms required to be lodged.

A notice must be published in the *Government Gazette*, but becomes effective when signed.

First Notice of Exemption

On 8 April 2020, the Minister signed the first Notice of Exemption. That document is the first ‘response to’ the State of Emergency declared by the Western Australian Government in response to COVID-19.

Extension of duration of development approval

For existing development approval holders who have not yet implemented their approval by substantially commencing development, the Notice of Exemption increases the duration of a development approval by 2 years. This is especially valuable for larger development proposals, which may have difficulty obtaining finance or achieving presales in the current environment. This extension is automatic – there is no need to notify or document the extension.

What is not clear is whether this extension of time extends to development approvals which have already lapsed. There is no suggestion in the Notice that they are excluded, and therefore, in theory, a development approval that lapsed 12 months ago could be re-enlivened for two years from that lapse date, providing an additional year of currency to the approval.

Exemptions from approval for certain land uses and temporary works

There are a number of exemptions in Schedule 1 from the need to obtain development approval for the use of land for particular purposes, and temporary works associated with those uses.

For example, approval is no longer required if land is in a commercial / centre / mixed-use zone where the proposed use is for consulting rooms, a shop (maximum floor area 400m² NLA), restaurant/café, convenience store (excluding the sale of fuel) or office, provided these land uses are not prohibited in the zone.

The benefit of this exemption will allow landowners to be able to, very quickly, offer vacant tenancies to a range of tenants without the need to have the proposal advertised, assessed and formally approved by the local government. Any temporary works required to allow the land use are also the subject of exemption.

Be aware that these exemptions are not permanent – that is, within 90 days of the State of Emergency declaration being lifted, there will be a need to either cease the use, or make application for permanent approval in the usual way.

The one exception to this is a permanent structure erected for the purpose of industrial style land uses on industrial zoned land. In this limited circumstance, the structures are deemed temporarily approved for two years from the date the use commences.

It remains to be seen whether subsequent Notices that are issued will change or refine this position.

Until then, we **strongly** suggest that you consider whether what is proposed would be likely to obtain approval under the existing planning framework before leases are entered into, or substantial works undertaken to facilitate a new land use, as there is no guarantee (at this stage) that those land uses or works will obtain permanent approval.

Exemptions from the requirement to provide car parking or cash-in-lieu

Schedule 5 of the Notice provides an exemption from the requirement to provide car parking bays at the ratio required by the relevant planning instrument.

This exemption is limited to a shortfall of 10 bays or less. It is not clear how this would be applied to the exemptions that apply to particular land uses in Schedule 1, or in relation to situations where there is a reliance on the reciprocal use of bays.

Again, this exemption is time limited, and therefore care should be taken in entering into leases where ongoing compliance cannot be guaranteed.

Further Notices

It is not clear whether the Minister will issue further Notices at this stage, although we suspect from the language used in the amendment to the Deemed Provisions, that at the very least, a Notice to provide planning powers for the recovery period after COVID-19 will be issued at some stage.

The following is a summary of some of the exemptions set out in the Minister's first Notice. It is a summary only and does not contain all the requirements that need to be met to claim the exemption.

A copy of the Minister's Notice is available on the DPLH website at the following link - <https://www.dplh.wa.gov.au/notice-of-exemptions>

If you ...	You get the following exemptions until 90 days after the State of Emergency Declaration ceases....	Provided you do the following
If you have an existing development approval that has not yet been acted upon OR you obtain a development approval before the State of Emergency declaration is revoked.	The period for substantial commencement is increased by 2 years from the original deadline.	Nothing required – automatic.
If you have property located in a commercial, centre, or mixed use zone	<p>No approval is required for the following <u>uses</u> or <u>temporary works</u> provided these uses are capable of approval under the Scheme (i.e. not X uses) –</p> <ul style="list-style-type: none"> • Shop (provided no larger than 400m² NLA) • Restaurant/café • Convenience store (excluding those selling fuel) • Consulting rooms • Office 	Notify the local government within 7 days of the use commencing.
If you have property in an industrial zone	<p>No approval is required for the following <u>uses</u> or <u>temporary works</u> provided these uses are capable of approval under the scheme (i.e. not X uses) –</p> <ul style="list-style-type: none"> • Industry • Industry-light • Trade Supplies • Warehouse / Storage • Transport Depot 	<p>Notify the local government within 7 days of the use commencing.</p> <p>Any works undertaken will have a deemed approval for 2 years, after which time they must be removed unless a further approval has been obtained.</p>
If you are operating your business from your home	<p>No approval is required for the following <u>uses</u> and <u>temporary works</u> –</p> <ul style="list-style-type: none"> • Home business • Home occupation 	Notify the local government within 7 days of the use commencing.
If you need to park your commercial vehicles	No approval is required for <u>the use</u> and any <u>temporary works</u> for commercial vehicle parking.	Notify the local government within 7 days of the use commencing.

If you ...	You get the following exemptions until 90 days after the State of Emergency Declaration ceases....	Provided you do the following
If you need to accommodate a workforce	No approval is required for <u>the use</u> and any <u>temporary works</u> for temporary workers' accommodation which is necessary for the construction etc of essential services.	Notify the local government within 7 days of the use commencing.
If you have an existing operation selling goods or fuel which limits the time during which deliveries, loading and unloading may occur.	Your existing development approval is varied to allow loading and unloading and delivery of goods at any time.	Notify the local government within 7 days of varying your operations.
If you have an existing operation that is used for a hotel, tavern, restaurant/café which imposes restrictions on where food is to be consumed (i.e. where food must or must not be consumed)	Your existing development approval is varied to remove these restrictions.	Notify the local government within 7 days of varying your operations.
If you have an existing development approval OR you obtain a development approval for a non-residential development before the State of Emergency declaration is revoked	You receive an exemption from providing up to 10 parking bays	Nothing required – automatic.
If you have an existing development approval with a requirement to pay cash-in-lieu of providing car parking bays for a non-residential development.	You receive an exemption from making payment.	Nothing required – automatic.

Further advice?

Moharich and More remains open during the COVID-19 State of Emergency and is available to assist clients navigating these rapidly changing planning frameworks.

Please give us a call on 9367 5559 and leave a message, or email us at info@moharichandmore.com.au for further assistance.